STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL ARBAN LAWSON and
LISA LYNN LAWSON,

Plaintiffs-Appellants,

v

GENTNER TRUCKING COMPANY, a Michigan Corporation and TONY PAT META, Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED
August 1, 2000

No. 211872
Monroe Circuit Court
LC No. 95-003933-NI

Before: Markey, P.J., and Doctoroff and Murphy, JJ.

PER CURIAM.

Plaintiffs Michael and Lisa Lawson (hereafter "plaintiffs") appeal as of right from a jury verdict partially in favor of plaintiffs in this automobile negligence action. The accident occurred when Michael Lawson (hereafter "plaintiff") collided with a semi-truck, owned by defendant Gentner Trucking Company and driven by defendant Tony Meta, which had rolled through a stop sign.

Following a jury trial, at the close of which the trial court directed a verdict finding defendants negligent and denied plaintiffs' motion for a directed verdict on the issue of plaintiff's alleged comparative negligence, the jury returned its verdict pursuant to a special form. Finding that plaintiff sustained economic loss damages consisting of wage loss beyond three years of the date of the accident, but that defendants' negligence was not the proximate cause of plaintiff's economic loss, the jury awarded no economic damages. The jury then found that defendants' negligence was the proximate cause of an injury to plaintiff, which injury resulted in the serious impairment of a bodily function, and accordingly awarded plaintiff $125,000 in present non-economic loss damages, and awarded plaintiff Lisa Lawson $100,000 in present non-economic loss damages. However, the jury awarded plaintiffs no future non-economic loss damages. Finally, the jury found that plaintiff was fifteen percent comparatively negligent The court entered a judgment on the jury verdict, incorporating each of the jury's findings and ordering defendants liable to plaintiffs for damages in the amount of $191,250 plus interest and costs.

Plaintiffs subsequently filed a motion seeking a partial new trial on the issues of economic and future non-economic damages and comparative negligence, contending that the jury's findings on these issues were not supported by the evidence. At a hearing the trial court found that evidence indicating plaintiff may not have done enough to aid his rehabilitation, and that he may have suffered intervening injuries, could support the jury's denial of economic and future non-economic damages. The court also indicated that with regard to plaintiff's comparative negligence, it found that there were questions of fact as to when plaintiff saw Meta's truck and whether plaintiff braked in reasonable time to avoid the collision. The court denied plaintiffs' motion on all grounds.

The first question we must address is whether plaintiffs' acceptance of payment on the favorable portion of the jury verdict and judgment forecloses their right to pursue this appeal. We review this issue of law de novo. See *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 506; 556 NW2d 528 (1996).

As a general rule, a plaintiff accepting money due on a money judgment waives the right to maintain an appeal or to seek a review of the judgment for error. *Wohlfert v Kresge*, 120 Mich App 178, 180; 327 NW2d 427 (1982). This rule applies if the appeal or review may result in placing at issue the plaintiff's right to the money received. *Id.* However, there is no waiver where the appeal cannot affect the benefits already accepted. *Id.* In other words, if a plaintiff's appeal addresses an issue collateral to the benefits already accepted, it may proceed notwithstanding the acceptance of payment on a judgment. *Becker v Halliday*, 218 Mich App 576, 578; 554 NW2d 67 (1996). Accordingly, we must determine whether the present non-economic damages awarded, and the related payment accepted by plaintiffs, represent an issue separate and distinct from those raised in this appeal concerning the additional damages and comparative negligence.

In *Wohlfert*, the plaintiff was the personal representative of the estate of an individual who died as the result of an automobile accident. The jury found defendants negligent and returned a verdict for damages in the amount of $100,000. The plaintiff accepted payment on this verdict and executed a satisfaction of judgment. Subsequently, the plaintiff claimed on appeal that the court erred in failing to instruct the jury that the siblings of the deceased could be awarded damages for loss of society and companionship. This Court found that the jury's verdict included compensation for "the breakup of the family unit," and held that any allowable cause of action for the siblings' loss of companionship would involve losses that could not be considered separate and distinct from those addressed by the jury's initial verdict. *Wohlfert, supra* at 181. This Court dismissed the plaintiff's appeal.

In *Becker*, the plaintiff was awarded $200,000. She subsequently filed a motion for costs and attorney fees, which was denied following a hearing. Between the hearing and the release of the trial court's order denying the motion, the plaintiff and her counsel signed a satisfaction of judgment which expressly provided that all "interests, costs, and attorney fees" were included. In response to the plaintiff's subsequent appeal of the trial court's denial of attorney fees, the defendant argued that the satisfaction precluded an award of further fees. This Court first indicated that the action fell directly within the *Wohlfert* exception, noting that the amount already received by the plaintiff was not to be relitigated, and that the plaintiff's appeal addressed only whether the plaintiff was entitled to additional costs and fees provided by court rule. *Becker, supra* at 578. Nevertheless, this Court found that

because the satisfaction did not include any limiting language evidencing an intent to maintain the pending action for fees, the plaintiff had waived her right to any additional costs or fees she may have been entitled to under the court rules. *Id.* at 579-580.

In this case, plaintiffs argue that their appeal will in no way affect the present non-economic damages already accepted. They argue that were they to prevail, a new jury would merely have to consider whether defendants are liable for additional, and separately defined, damages. Plaintiffs also note that success on the comparative negligence issue would merely increase the previous award by fifteen percent. Having examined the jury's special verdict form, which addressed the various damages piecemeal, we agree. Unlike the scenario in *Wohlfert*, should plaintiffs prevail on the issues raised in this appeal, alternate findings on these issues could be reached without contradiction of or impact on the previous award of present non-economic damages. Because the present non-economic damages previously awarded and accepted will not be impacted, the claims herein presented represent sufficiently independent issues that plaintiffs' acceptance of defendants' payment on the initial jury verdict does not preclude this appeal. We therefore proceed to consider the substantive issues raised.

Plaintiffs first argue that the trial court abused its discretion in allowing evidence of plaintiff's conviction of operating a motor vehicle while impaired by intoxicating liquor seven years before the accident, evidence of plaintiff's having consumed one beer on the date of the accident, and the results of a urinalysis, conducted during an emergency room visit eighteen months after the accident, which indicated that plaintiff had a .215 blood-alcohol content and also showed the presence of barbituates, benzodiazopine and cocaine. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997).

Defendants' proffered damage theory was that any possible continued impairment suffered by plaintiff was not the result of injuries caused by the accident, but rather was attributable to alternative causes, one of which may have been long-term substance abuse. Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Ellsworth*, *supra* at 188-189. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282-283; 608 NW2d 525 (2000).

Plaintiffs contest the relevance of these items of evidence arguing that they lack probative value because, as isolated incidents of alcohol use, it would take a leap of logic to conclude that the incidents demonstrate a pattern of abuse. When reviewing a court's decision to admit evidence, this Court will not assess the weight and value of the evidence, but will only determine whether the evidence was a kind properly considered by the jury. *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993). Here, this evidence of plaintiff's use of alcohol falls squarely within the purview of MRE 401 because the extent and impact of plaintiff's use is of consequence to defendants' damage theory. The weight to be given this evidence was for the parties' counsel to argue to the jury, which both did strongly and effectively.

While plaintiffs primarily focus on the purported lack of relevance of the evidence, with regard to the urinalysis results plaintiffs do specifically contend that the court should have ruled this evidence inadmissible because of a lack of foundation establishing reliability. Plaintiffs concede that in the area of urinalysis results, no case law requires adherence to the strict foundational criteria established regarding blood tests. See *Clark v City of Flint*, 60 Mich App 364, 367; 230 NW2d 435 (1975). Nevertheless, plaintiffs argue that more than an exception to the hearsay rule should be shown before such evidence may be considered reliable. We agree with defendants, however, that as a hospital record detailing plaintiff's treatment during an emergency room visit, the urinalysis report was properly admitted pursuant to MRE 803(6).

Plaintiffs also contend that unfair prejudice exists because it is probable that the jury gave this evidence, which was minimally damaging, weight substantially disproportionate to its logically damaging effect. Unfair prejudice does not mean damaging. *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710; 550 NW2d 797 (1996). Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997). Given the parties' respective presentations of proofs and arguments, it is clear that the jury had an appropriate framework within which to evaluate the evidence. Any danger that the jury might haven placed undue weight on these isolated incidents was effectively countered by the repeated testimony of numerous witnesses supporting plaintiffs' claim that plaintiff was merely a social drinker. Further, the mere fact that the jury returned an unfavorable verdict on the issues of economic and future non-economic damages, which appears to represent the underlying premise of plaintiffs' argument, does not demonstrate that the evidence was unfairly prejudicial. While it is reasonable to assume that the jury accepted defendants' argument that a cause alternative to the accident accounted for plaintiff's condition, there is no direct indication in the jury's verdict that it determined such a cause to be long-term alcohol or drug abuse.

Plaintiffs next argue that the trial court abused its discretion in failing to grant their motion for a partial new trial on the issues of economic and future non-economic damages. See *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). Plaintiffs claim that the jury's verdict is against the great weight of the evidence and that this erroneous verdict is attributable to improper theories and argument pursued by defendants throughout the trial. We disagree.

A new trial may be granted on some of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). Such motions are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth, supra* at 194.

The jury's determination that defendants' negligence was not the proximate cause of plaintiff's economic damages and that plaintiffs were not entitled to future non-economic damages implies that the jury agreed with defendants' theory that a cause alternative to the accident accounted for such damages. Having reviewed the evidence, we do not believe that it preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Both plaintiffs and defendants introduced the testimony of doctors during the trial, all of whom agreed that plaintiff suffered a mild closed-head injury as the result of the accident. However, contrary to plaintiffs' witnesses, the treating physicians who attributed plaintiff's ongoing condition to the accident injuries, the two defense experts testified that something else was at work because statistically plaintiff should have long since overcome the accident-related mild traumatic brain injury. They testified that patients with such injuries generally recover within three to six months, and that the results of neuropsychological assessments of plaintiff did not reflect typical problems associated with traumatic brain injuries. They also testified that potential substance abuse could impact plaintiff's symptomatology, and that the serious eye injury plaintiff suffered eighteen months after the accident, which required emergency room treatment, could have exacerbated plaintiff's original injury.

Whether the evidence preponderates heavily against the verdict usually involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), and if there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Lemmon, supra* at 642-643; *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943). This is precisely the situation in this case, as the jury had to judge the credibility of each sides' medical witnesses with regard to their observations of plaintiff and his symptoms and their interpretation of plaintiff's recent medical history and his various neuropsychological assessment results. It may be inferred from the verdict that the jury found the defense theory plausible and defendants' witnesses more credible. This Court should not disturb that determination. *Lemmon, supra* at 642-643.

Plaintiffs in part argue that the verdict of limited damages was against the great weight of the evidence as the result of defense counsel's improper case presentation. Having reviewed the entire record, however, we conclude that when the contested questions and comments are considered in context, it is apparent that they were not improper and did not unfairly influence the jury. See *Willoughby v Lehrbass*, 150 Mich App 319, 333-334; 388 NW2d 688 (1986). Because the jury's verdict was not against the great weight of the evidence, the trial court did not abuse its discretion in denying plaintiffs' motion for a partial new trial. *Jones, supra* at 404.

Finally, plaintiffs argue that the trial court erred in denying their motion for a directed verdict on the issue of plaintiff's comparative negligence. We again disagree.

Review of the grant or denial of a directed verdict is de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). The appellate court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed. In doing so, the appellate court views the evidence in the light most favorable to the nonmoving party and grants him every reasonable inference and resolves any conflict in the evidence in his favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000).

Directed verdicts are viewed with disfavor, particularly in negligence cases. *Berryman v K Mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992). But if no factual question exists, the trial court may grant a directed verdict. *Michigan Mutual Ins Co v CNA Ins Cos*, 181 Mich App 376, 380; 448 NW2d 854 (1989). On review, the appellate court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the factfinder's responsibility to determine the credibility and weight of the testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

Testimony indicated that Meta, having slowed to an almost complete stop approaching the accident intersection from the east, rolled through the stop sign at approximately seven miles per hour. Additional evidence demonstrated that a clear sight line existed across the southwest corner of the intersection. Because the collision occurred in the northbound lane of the crossing road, Meta had fully traversed one lane of traffic before plaintiff struck the front corner of the semi-truck. Accordingly, it is reasonable to infer, as defendants theorized, that plaintiff had a few seconds within which he could have observed Meta's truck passing slowly into the intersection without stopping. The responding police officer testified that he observed approximately fifty feet of skid marks, attributable to plaintiff's pickup, in that northbound lane. It is therefore also reasonable to infer that while plaintiff made an effort to stop, he took no other evasive action such as attempting to turn wide and around the front of Meta's truck. Additionally, although the officer testified that he did not believe plaintiff did anything to contribute to the accident, he also testified that it is every motorist's responsibility to drive with due caution, this duty extending to situations where another driver may be openly at fault.

Contrary to plaintiffs' claim, the detailed evidence was all credible. Thus, although we consider it a close question, in agreement with the trial court we find that this evidence did raise a question of fact appropriate for presentation to the jury. It is plausible that reasonable jurors could reach differing conclusions as to whether plaintiff was partially negligent in failing to avoid the collision. *Hunt, supra*. The jury's determination that plaintiff was fifteen percent negligent is not unreasonable.

Affirmed.

/s/ Jane E. Markey
/s/ Martin M. Doctoroff
/s/ William B. Murphy